

ENTERED

November 24, 2015

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GIBALTAR FINANCE & MORTGAGE, INC., §	§	
Plaintiff, §	§	
VS. §	§	CIVIL ACTION NO. 4:14-CV-00257
TEXAS COMMUNITY BANK, N.A., <i>et al</i> , §	§	
Defendants. §	§	
	§	
	§	
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	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is the Federal Deposit Insurance Corporation's ("FDIC"), in its capacity as Receiver for defendant, Texas Community Bank, N.A. ("Bank"), motions for partial dismissal of the plaintiff's suit pursuant to Federal Rules of Civil Procedure 12(b) (1) and (6), and in the alternative, motion for partial summary judgment pursuant to Federal Rules of Civil Procedure 56 and motion to strike the Notice of Lis Pendens (Dkt. No. 9). The plaintiff, Gibraltar Finance & Mortgage, Inc. ("Gibraltar") filed a response (Dkt. No. 14) and supplemental response (Dkt. No. 20) in opposition to the motions. Gibraltar filed a cross motion for partial summary judgment pursuant to Federal Rules of Civil Procedure 56 (Dkt. No. 19), to which the FDIC has responded (Dkt. No. 21). After having carefully considered the motions, responses, and the applicable law, the Court determines that all motions should be **DENIED**.

On August 3, 2012, Gibraltar filed suit against the Bank and its former officer, Andrew Taylor ("Taylor") in the 55th Judicial District Court of Harris County, Texas, identified as Cause No. 2012-44510. Gibraltar's original petition asserts claims for negligence, negligent misrepresentation, and wrongful foreclosure concerning the Bank's foreclosure on certain real property on April 3, 2012. On August 8, 2012, Gibraltar filed a Notice of Lis Pendens in the Real Property Records of Harris County.

On December 13, 2013, the Office of the Comptroller of the Currency closed the Bank and appointed the FDIC as receiver. On February 3, 2014, the FDIC timely removed the state court action to this Court. On February 10, 2014, the Court issued a stay of proceedings to allow Gibraltar to pursue its administrative claim. On May 2, 2014, Gibraltar filed its Proof of Claim with the FDIC. The FDIC rejected Gibraltar's administrative claim on December 5, 2014. On January 30, 2015, the Court granted Gibraltar's motion lifting the stay.

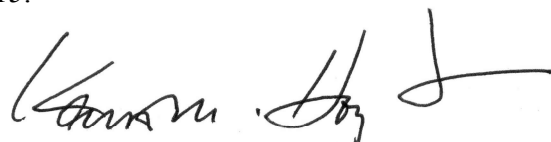
The FDIC now asserts that subject matter jurisdiction is lacking as to Gibraltar's purported claim for rescission due to its failure to exhaust administrative remedies. Specifically, the FDIC argues that Gibraltar did not submit a claim for rescission through the administrative claims process as required by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Likewise, the FDIC claims that while Gibraltar's original petition prays that "the Substitute Trustee's Deed entered under Harris County Clerk file no. 20120248015 be set aside", it does not expressly allege a claim for rescission; nor has Gibraltar satisfied the conditions precedent to a claim for rescission.

The Court is of the opinion that several fact issues exist in this case. Thus, the Court denies the motions at this time and reserves the right to reconsider the motions in its discretion.

Based on the foregoing, the FDIC's partial motions to dismiss, motion for partial summary judgment, and motion to strike are **DENIED**. Moreover, Gibraltar's motion for partial summary judgment is also **DENIED**.

It is so **ORDERED**.

SIGNED on this 24th day of November, 2015.

A handwritten signature in black ink, appearing to read "Kenneth M. Hoyt", written over a horizontal line.

Kenneth M. Hoyt
United States District Judge